

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Charter Communications, Inc., on behalf of)	CSR 6136-E
Falcon Cable Media, a California Limited)	
Partnership; Charter Communications VI, LLC;)	
and Interlink Communications Partners, LLC)	
)	
Petition for Determination of Effective)	
Competition in Eight Virginia Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 2004

Released: April 16, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Charter Communications, Inc., on behalf of Falcon Cable Media, a California Limited Partnership; Charter Communications VI, LLC; and Interlink Communications Partners, LLC ("Charter") has filed with the Commission a petition for a determination of effective competition in the eight Virginia communities listed in Attachment A (the "Communities") pursuant to Section 623(a) of the Communications Act,¹ and the Commission's implementing rules.² Charter alleges that its cable systems serving those Communities are subject to effective competition and are therefore exempt from cable rate regulation. More particularly, Charter claims that the presence of effective competition in seven of the Communities stems from the competing services provided by two unaffiliated direct broadcast satellite ("DBS") providers, Direct TV and EchoStar. Charter claims it is subject to effective competition in these Communities under the "competing provider" effective competition test set forth in Section 623(1)(1)(B) of the Communications Act.

2. Charter further claims that it is subject to effective competition in Accomack County, Virginia, because fewer than 30 percent of the households in that community subscribe to Charter's cable services. Charter asserts that it is thus subject to effective competition in this community under the "low penetration" effective competition test set forth in Section 623(1)(1)(A) of the Act.

3. Oppositions to the petition have been filed on behalf of the Cities of Suffolk and Bedford, and the Towns of Chincoteague, Colonial Beach, and Rocky Mount, Virginia (the "Cities"); and Charter filed replies.

¹47 U.S.C. § 543(a).

²47 C.F.R. § 76.905(b).

II. DISCUSSION

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act, and Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ Section 623(l) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.⁶ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.⁷

A. Application of The "Competing Provider" Effective Competition Test In Seven Virginia communities

5. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁸ Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁹ Charter has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.¹⁰ Moreover, the two DBS providers' subscriber growth reached approximately 20.4 million as of June 30, 2003, comprising approximately 20 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and EchoStar the fourth largest, MVPD provider as of June 2003.¹¹ We conclude that the population of the Communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹² We further find that Charter has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS

³47 C.F.R. § 76.906.

⁴See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

⁶See 47 U.S.C. § 543(l)(1)(A)-(D).

⁷See 47 C.F.R. § 76.905.

⁸ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁹See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹⁰See Petition at 4-5 and Exhibit 1.

¹¹ *Tenth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 04-5, released January 28, 2004, at Par. 65-67.

¹²See 47 C.F.R. § 76.905(g). *See also* Charter Petition at 4-5 and Exhibit 2 & 3. Exhibits 2 & 3 include channel line-ups for Charter's cable systems serving the Communities as well as those of Direct TV and EchoStar.

providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

6. The Cities contend that Charter failed to establish that the Community populations have been sufficiently made aware of the availability of DBS services to satisfy the first prong of the competing provider test. This argument is rejected. Charter provided numerous examples of local, regional and national advertisements for DBS service to which this population has been exposed, and referred to the extensive round of DBS national advertising in the Fall of 2002 during such high-profile sporting events such as professional baseball playoffs and NFL football games.¹³ Moreover, in view of the two DBS providers' subscriber growth reaching approximately 20.4 million as of June 30, 2003, comprising approximately 20 percent of all MVPD subscribers nationwide; DirecTV having become the second largest, and EchoStar the fourth largest, MVPD provider as noted above, we find it reasonable to conclude that the population of the Communities at issue here are aware of the availability of DBS services for purposes of the first prong of the competing provider test. Charter's showing of the numbers of households in the Communities that have become DBS subscribers amply supports this conclusion.

7. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter's assertion that it is the largest MVPD provider in each of these Communities was not disputed by the Cities.¹⁴

8. Charter provided 2000 Census data showing the number of households for each of the seven Communities.¹⁵ Charter then compared the 2000 Census households for each of the Communities with the households in each of the U.S. Postal Zip Code areas encompassing each Community, and allocated that proportion of the DBS subscribers within each such Zip Code to each Community.¹⁶ The resulting numbers of DBS subscribers were then compared to the household numbers for each Community to demonstrate that in each Community the DBS MPVD providers collectively have attained subscriber penetration levels ranging from 16.40 percent in Chincoteague, Virginia, to 32.50 percent in Bedford, Virginia, or in excess of 15 percent in each of the Communities.¹⁷ We are satisfied that this information provided by Charter established a reasonable basis for finding that the second prong of the competing provider test is met in these seven Communities.

9. In opposition, the Cities disputed Charter's penetration figures for each of the Communities on the grounds that they were based on flawed data. First, the Cities faulted Charter's DBS subscriber allocations based on the use of the five digit Zip Code data. The Cities contended that higher DBS penetration rates exist in the rural portion of the Zip Codes outside of each Community, accompanied by lower penetration rates within each Community. They contend that such lower penetration rates are not reflected by five digit Zip Code data from the SkyTrends report utilized by Charter in developing its DBS subscriber figures. However, the Cities failed to provide any data that supports this contention. Therefore, we cannot accept the Cities' objections as a credible basis for rejection of the data and DBS subscriber allocations presented by Charter.

¹³ Petition at 3-5 and Exhibit 1.

¹⁴ Petition at 5 and Exhibit 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 5-7 and Exhibit 5. The penetration rate for each Community is set forth on Attachment A.

10. The Cities also criticized Charter's failure to support its petition with SkyTrends' Zip Code plus four data, which they contend is available and would more accurately identify the numbers of DBS subscribers within each Community than the five digit Zip Code data used. Charter met its initial burden of coming forward with evidence relative to effective competition in the Communities at issue, by presenting DBS subscriber penetration levels developed from subscriber allocation figures based on the five digit Zip Code data discussed above. LFA argument alone that such data may be flawed failed to rebut Charter's evidentiary showing. Although the Commission accepts Zip Code plus four data, it has not expressed a preference for one form of data over another and accepts five digit Zip Code data as reliable for purposes of determining effective competition.

11. We accept the data provided by Charter as providing a reasonable basis for finding that DBS penetration exceeds 15 percent in these seven Communities. These penetration estimates provide a sufficient margin of error with respect to the 15 percent competing provider test threshold to overcome any concerns raised by unsupported arguments about DBS penetration imbalances in rural and urban areas.

B. Application of the "Low Penetration" Effective Competition Test in Accomack County, Virginia

12. Another test by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the systems' franchise area subscribe to the system's service.¹⁸ Charter has provided information under the low penetration test showing that only 2,258, or 21.63 percent, of the 10,453 households in Accomack County, Virginia subscribe to its cable services.¹⁹ Charter's household data is taken from the 2000 Census.²⁰

13. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the Virginia Carolina Communities set forth on Attachment A, including Accomack County, Virginia, are subject to effective competition.

¹⁸See 47 U.S.C § 543(I)(I)(A) & 47 C.F.R. S 76.905(b)(I), which set forth the "low penetration" effective competition test.

¹⁹Petition at 7-8 and Exhibits 6 & 7.

²⁰*Id.*

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition in the Virginia Communities set forth on Attachment A, including Accomack County, Virginia, filed by Charter Communications, Inc. **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert, Deputy Chief, Policy Division
Media Bureau

ATTACHMENT A

File No. CSR 6136-E

COMMUNITIES SERVED BY

Charter Communications, Inc. on behalf of Falcon Cable Media, a California Limited Partnership;
Charter Communications VI, LLC; and Interlink Communications Partners, LLC

Competing Provider Test

Virginia Communities	2000 Census Households**	Zip Code Households	Alloc	DBS Subs Per Zip Code	DBS Subs Allocated	CPR*
Bedford	2,519	8,061	31.2%	2,621	818	32.5%
Chincoteague	2,068	2,522	82.0%	414	339	16.4%
Colonial Beach	1,437	3,734	38.5%	1,139	439	30.5%
Lebanon	1,420	4,016	35.4%	853	302	21.3%
Rock Mount	1,698	7,838	21.7%	1,746	379	22.3%
Suffolk	23,283	28,397	82.0%	8,798	7,214	31.0%
Wythville	3,504	6,621	52.9%	1,828	967	27.6%

Accomack County is considered under the “low penetration” effective competition test.

*CPR = Percent DBS penetration rates

**See Charter Petition at Exhibits 4, 5, & 6.